No. 10504

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

RIDDER BROTHERS, Incorporated, a corporation,
Appellant.

vs.

RAE KINGSLEY BLETHEN, F. D. HAMMONS and WILLIAM K. BLETHEN, as Executors of the Estate of Clarance B. Blethen, Deceased; RAE KINGSLEY BLETHEN, FRANCIS A. BLETHEN; WILLIAM K. BLETHEN; JOHN ALDEN BLETHEN; CLARANCE B. BLETHEN; THE BLETHEN CORPORATION, a Corporation; and SEATTLE TIMES COMPANY, a Corporation,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

APPELLANT'S REPLY BRIEF

JONES & BRONSON,
H. B. JONES
STORY BIRDSEYE
610 Colman Building,
Seattle, Washington

OPPENHEIMER, HODGSON, BROWN, DONNELLY and BAER
WILLIAM H. OPPENHEIMER
MONTREVILLE J. BROWN
First National Bank Building
St. Paul, Minnesota

Attorneys for Appellant.

Of counsel:
MYLES B. AMEND
135 William Street
New York, N. Y.

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St. Paul, Minnesota

Attorneys for Appellant.

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MYLES B. AMEND
135 William Street
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APPELLANT'S REPLY BRIEF

I.

As to the second matter in controversy—

(1) **The suit is maintainable by appellant, and**

(2) **As appellees stand to lose in excess of $3,000, exclusive of interest and costs, the necessary amount is involved to give the lower court jurisdiction.**

Appellees argue that under Washington law the only one who can sue is "the real party in interest"; and that, as the contract in question is one for the

benefit of Clarance B. Blethen II, he is "the real party in interest" and he alone can sue to enforce the contract. The case of *MacGerry v. Rodgers*, 144 Wash. 375, 258 Pac. 314, is cited in support of this argument. This case, as we read it, does not hold as contended by appellees. But the holding in the case, whatever it is, is of no importance here. This suit is in Federal Court. The rules of Federal Civil Procedure control. Rule 17(a) with respect to a contract for the benefit of a third party provides that the promisee may sue to enforce such contract without joining the third party as a party plaintiff. The rule reads as follows:

> "(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, *a party with whom or in whose name a contract has been made for the benefit of another*, or a party authorized by statute *may sue in his own name without joining with him the party for whose benefit the action is brought;* and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States." (Italics ours)

This rule, except for the last clause, is verbatim of Equity Rule 37, except that the word "expressly" is omitted.

The rules of civil procedure are controlling in all of the District Courts of the United States as to all procedural matters covered thereby.

> *Sibbach v. Wilson & Co. Inc.*, 312 U.S. 1, 61 S. Ct. 422, 85 L. ed. 479.

The subject of parties to litigation involve procedural rather than substantative rights.

1 Edmunds, Federal Rules of Civil Procedure, p. 1, and 1941 Cumulative Supplement, p. 1;

2 Moore's Federal Practice under the New Federal Rules, §17.12, p. 2074;

47 C.J., Parties, II (§14), p. 17;

21 C.J.S., Courts, §172,a, p. 266;

35 C.J.S., Federal Courts, §96,b, p. 964, § 123,b, p. 93;

39 Am. Jur., Parties, §3, p. 851, §18, pages 873 and 874, §21, p. 878.

So, in view of 17(a), the contention that, as to the second matter in controversy no cause of action is stated, and consequently no amount whatsoever is involved, because the right to maintain a suit to establish a trust in favor of Clarance B. Blethen II is vested solely in Clarance B. Blethen II, is without merit.

And we insist this is so even under Washington law.

The *MacGerry* case does no more than to hold that the plaintiff in her suit to recover damages, alleged to have been sustained by her by reason of breach of a contract partly for her benefit and partly for the benefit of her daughter, was limited in her recovery to the damages sustained by her. She sued to recover damages to her. The court said this consisted of support for herself and support for her daughter during her minority, the period during which she would be legally bound to take care of her daughter; that loss of support for the daughter after reaching majority did not constitute damages to plain-

tiff (the mother), but damages to the daughter and that the daughter upon reaching majority could sue to recover such damages. The case as we read it, is not one holding that one who makes a contract for the benefit of a third party cannot sue in his own name without joining the party for whose benefit the action is brought. The case simply cannot be construed as holding any such thing in the light of Washington statutory law.

Remington Revised Statutes, Wash. §§179 and 180 read as follows:

> §179. "Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law."
>
> §180. "An executor or administrator, a trustee of an express trust, a guardian of a minor or person of unsound mind, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another."

See:

Goodfellow v. First National Bank, 71 Wash. 554, 129 Pac. 90, 44 L.R.A. (N.S.) 580.

So, under the Washington law we find the suit at bar maintainable by appellant, that is, with reference to the suit as a suit for the benefit of Clarance B. Blethen II, a third party beneficiary under the contract in question.

For cases upholding suits by a person with whom or

in whose name a contract has been made for the benefit of a third party without joining the third party, under statutes similar in wording or in force and effect to the Washington Statute, see the cases cited in—

39 Am. Jur., Parties, §18, n. 1, p. 873; and

2 Moore's Federal Practice under the New Federal Rules, §17. 12, n. 3, p. 2074.

See also:

1 Restatement of the Law of Contracts, pages 158 and 164, and Washington Annotations thereto.

Federal Law of Contracts, Vol. II, §347, p. 46;

12 Am. Jur., Contracts, §273, p. 818;

13 C.J., Contracts, §815, p. 707.

Appellees concede that there are many decisions supporting appellant's contention that it is the pecuniary result to either party that controls but argue that the "modern" decisions of the United States Supreme Court indicate that the *sole* test is the value of the plaintiff's possible gain. We do not so interpret these cases. Moreover, it is significant that none of the authorities relied on by appellees overrule earlier decisions of the Supreme Court in which jurisdiction was sustained because the possible loss to the defendant exceeded the requisite amount although plaintiff's possible gain did not.

The first Supreme Court decision referred to by appellees is *Miller v. Clark*, 138 U.S. 223, 11 S. Ct. 300, 34 L. ed. 966. The plaintiff in the case, claiming a one-

sixth interest in an estate, sought to prevent an executor from delivering three bank books each representing $1,792.61 to three persons in whose respective names they stood. These individuals, who were also defendants, likewise had a one-sixth interest each in the estate. The defendants challenged the jurisdiction of the Supreme Court ($5,000 was then the requisite amount) "because the matter in dispute as to each of the defendants other than the executor does not exceed the sum or value of $5,000."

While jurisdiction was denied "on the ground that the interest of the plaintiff does not exceed $5,000," there is no significance in the Court's use of this language. The same result would necessarily have followed had the Court thought it necessary to comment on the defendants' possible loss. Individually, each defendant stood to lose one-half of $1,792.61 (they would receive one-half of the sum through the estate if plaintiff was successful) and even collectively they could only lose one-half of $5,377.83. In other words, the result had to be the same whether considered from the standpoint of plaintiff's gain or that of the defendants' loss. The Court was not called upon to choose between the two tests.

Bruce v. Manchester & Keene Railroad, 117 U.S. 514, 6 S. Ct. 849, 29 L. ed. 990 (page 23 of appellees' brief) likewise is no authortiy for appellees. Plaintiffs there sued to collect a small amount of delinquent interest on certain bonds and prayed that a mortgage securing the bond issue be foreclosed. In denying jurisdiction, the Court pointed out that payment to plaintiffs of a sum less than the requisite amount would

end the litigation. The much greater sums that would be involved by the possible foreclosure of the mortgage they regarded as "one of the collateral and indirect effects of the decree not to be considered in determining our jurisdiction." The inference is strong that had this latter been a more direct result, the Court would have considered the possible loss to the defendants in ruling on the issue.

Appellees rely strongly on *Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co.*, 239 U.S. 121, 36 S. Ct. 30, 60 L. ed. 174 (pages 31 and 32 of their brief) but they are not justified in taking this position. The facts of the case are the exact converse of those in *Mississippi & Missouri Railroad Co. v. Ward*, 2 Black 485, 67 U.S. 485, 17 L. ed. 311, a leading case relied on by appellant. In the *Glenwood* case plaintiff's right to do business free of interference by the poles and wires of defendant was of substantial value while the cost to defendant of moving this equipment was less than the jurisdictional amount. The Court properly accepted jurisdiction, viewing the matter from the standpoint of the pecuniary result to plaintiff.

It is most significant that in reaching this result the Court relied principally upon and quoted from Mississippi & Missouri Railroad Co. v. Ward, supra, in which the Court found that jurisdiction existed because the loss to defendant exceeded the jurisdictional amount although the value to plaintiff was insufficient.

The Glenwood case, in effect, expressly approved and reaffirmed the Mississippi & Missouri Railroad

case. The two decisions taken together clearly establish that the Supreme Court approves of the rule as contended for by appellant, namely that the pecuniary result to each party must be considered.

The *Mississipi & Missouri* case was likewise relied on by the Supreme Court in *Hunt v. New York Cotton Exchange*, 205 U.S. 322, 27 S. Ct. 529, 51 L. ed. 821 (page 32 of appellees' brief). In that case the value of the right which plaintiff sought to protect exceeded the jurisdictional amount and there was no occasion to inquire into the possible loss that the defendant might suffer.

KVOS, Inc., v. Associated Press, 299 U.S. 269, 57 S. Ct. 197, 81 L. ed. 83, and *McNutt v. General Motors Acceptance Corporation*, 298 U.S. 178, 56 S. Ct. 780, 80 L. ed. 1135 (pages 32 and 33 of appellees' brief) are not helpful. In both cases the plaintiffs attempted to allege that the value of their respective rights exceeded the jurisdictional amount and in each instance the Supreme Court held that the pleadings were insufficient to establish jurisdiction. In neither case was any effort made to allege or show the amount of the defendants' possible loss and so the Supreme Court had no occasion to consider the problem from this standpoint.

Gibbs v. Buck, 307 U.S. 66, 59 S. Ct. 725, 83 L. ed. 1111, and *Buck v. Gallagher*, 307 U.S. 95, 59 S. Ct. 740, 83 L. ed. 1128 (pages 33 and 34 of appellees' brief) are sister cases dealing with the efforts of ASCAP to escape state control in Florida and Washington respectively. In each case, ASCAP, as plaintiff, alleged that the value to it of the matter in dispute

exceeded the jurisdictional amount and in both cases the allegations were held to be sufficient. In neither complaint was any reference made by the plaintiff to the possible loss that the defendants might suffer and again the Supreme Court had no occasion to consider the matter. The only issue created by the pleadings on the question of jurisdiction was the value to plaintiff of the right to carry on its business free of statutory regulations.

Lion Bonding Company v. Karatz, 262 U.S. 77, 43 S. Ct. 480, 67 L. ed. 871 (page 34 of appellees' brief) is not in point. In that action a common contract creditor brought suit against a corporation seeking to recover judgment on a $2,100 debt and asking for the appointment of a receiver. The latter was denied because in the absence of statutory authority a receiver can not be appointed for a corporation at the suit of a simple contract creditor. The Court then went on to refuse jurisdiction because plaintiff was seeking to recover less than the jurisdictional amount. Here again the Supreme Court had no occasion to consider the possible loss to defendant.

On pages 35 and 36 of their brief appellees list half a dozen of the cases which follow the well established rule that the claims of various plaintiffs can not be aggregated to meet the requirements of jurisdictional amount unless the complainants have a common, undivided interest. This principal of law is simply an additional test to be applied under certain circumstances—it is not inconsistent with the rule contended for by appellant. For instance, the fact that defendant may lose more than $3,000 will not alone confer

jurisdiction of a controversy upon a Federal Court. There must also be diversity of citizenship. Also, if there are several plaintiffs whose claims have been totalled to get the requisite amount, they must further meet the test outlined above. The doctrine of these cases is simply another and *additional* rule designed to prevent the circumvention of the statutory requirement by the joining of unrelated claims of insufficient amount.

Incidentally, in considering this latter group of cases, it should be noted that in the most recent (*Thompson v. Gaskill*, 315 U.S. 442, 62 S. Ct. 673, 86 L. ed. 951) the Supreme Court refers to the value of the matter in controversy as being the "*pecuniary consequence to those involved in the litigation*" (Italics ours).

Appellees refer (page 36) to this Court's decision in *Electro-Therapy Products v. Strong* (C.C.A. 9) 84 F.(2d) 766. In that case plaintiff sued to enforce a contract calling for the assignment to him of certain inventions. This Court held that the jurisdiction of the District Court was to be tested by the value of plaintiff's right to have the inventions assigned and pointed out that such value "depends, of course, on the value of the inventions." In other words, the value of plaintiff's possible gain was exactly the same as defendant's possible loss. This Court had no occasion to consider whether the matter should be viewed from the standpoint of the plaintiff or that of the defendant. There is nothing in this decision to indicate that this Court feels that in a proper case the loss to the

defendant can not be considered in connection with the determination of jurisdiction.

The decision in *Central Mexico Light & Power Co. v. Munch* (C.C.A. 2) 116 F.(2d) 85 (page 37 of appellees' brief) does not suggest that the Circuit Court for the Second Circuit is committed to the rule contended for by appellees but, on the contrary, indicates that they approve the test urged by appellant. In this action plaintiff, a public utility, sued to restrain three individual holders of its bonds from the further prosecution of suits brought on the obligations. No one of the defendants held as much as $3,000 of the bonds.

In determining whether or not jurisdiction existed the Court considered the problem at length from the standpoint of the possible loss to the defendants and debated whether their respective holdings could be aggregated for the purpose of meeting the requisite amount. They held that the allegations of the complaint fell short of establishing the exception (as laid down in *McDaniel v. Traylor*, 196 U.S. 415, 25 S. Ct. 369, 59 L. ed. 533) to the rule prohibiting the aggregation of distinct claims.

Plaintiffs, conceding that jurisdiction could not be sustained from the standpoint of the possible loss to defendants if the latter's claims were considered separately, also argued that the application of the test from the plaintiff's viewpoint established that jurisdiction existed. On this phase of the matter they contended that the value to them of the interest which they were seeking to protect exceeded $3,000. The

Court held, however, that the showing made by plaintiffs on this point likewise failed to establish their contention.

It is apparent that the Circuit Court examined this case from the standpoint of both parties and concluded that there was no showing that the possible pecuniary result to either plaintiffs or defendants established jurisdiction.

Purcell v. Summers (C.C.A. 4) 126 F.(2d) 390 (page 37 of appellees' brief) is not helpful. This was a suit brought by certain bishops of the Methodist Church against various representatives of an organization that was seeking to appropriate the name of the Methodist Episcopal Church, South, and the use of its properties. Plaintiffs asked for an injunction preventing this and for a declaratory judgment establishing that the merger of several Methodist Churches (including the Methodist Episcopal Church, South) was valid. The church properties involved ran into millions of dollars and it was conceded that the right to control the name alone was of great value. Plaintiff relied upon the value to it of the properties and the right to the name and the Court found that these were sufficient to confer jurisdiction.

It is obvious that in this case the value of the matter in controversy was exactly the same when viewed from the standpoint of the plaintiff as when regarded from the defendant's viewpoint. The court had no occasion to choose between the two rules and the fact that they refer to "the value to the plaintiffs" as being the test in no way indicates that they would not

consider the pecuniary result to the defendant in a proper case.

Brief reference is made by appellees (page 38) to the District Court decision in the foregoing case. *Purcell v. Summers*, 34 F. Supp. 421. The lower court took the same view of the matter as did the Circuit Court and our discussion of the latter's decision applies equally to the opinion of the lower court. Incidentally, the discussion of this point by the District Court is pure dictum as the court went on to deny jurisdiction, basing its conclusions "entirely on the fact that the State Courts * * * have taken possession of the res * * *."

The last case relied on by appellees (page 38) on this point is *Gavica v. Donaugh* (C.C.A. 9) 93 F.(2d) 173. In this case four groups of sheep raisers sued together to establish their right to graze sheep on public lands free of interference by the defendants. It was alleged that the matters in controversy exceeded the jurisdictional amount but there was no claim that any one of the four causes of action when considered separately involved the requisite sum. The four matters were distinct and several and no facts showing a common, undivided interest were alleged. This Court properly held that under such circumstances the matters could not be aggregated for the purpose of conferring jurisdiction. As is common in so many injunction cases, the Court in this decision speaks of the matters in controversy as being the rights which the various plaintiffs assert and seek to have protected. But there is nothing in this statement to indicate that the possible consequence to the defendant

can not be considered when the occasion therefor arises.

It is significant that all of the research conducted by counsel for both parties has failed to disclose a single case in which a court has deliberately weighed the rule contended for by appellant against that sought for by appellees and then, adopting the latter, concluded that the matter must be viewed *solely* from the standpoint of the plaintiff. It is important to note that in those cases in which it has been necessary to choose between the two principles, the Court has *in all instances* applied the test that it is the pecuniary result *to either party* that controls.

II.

As to the first matter in controversy,

(1). A cause of action is stated, and
(2). The jurisdictional amount is involved.

The Supplemental Agreement as amended (Tr. 56 to 79) provides that Mr. Blethen should execute a will or other instrument providing that his Class B common stock be held in trust by three trustees "after his death" for a period of 21 years and that Mr. Blethen should provide in such will or other instrument that, in event of any difference of opinion between the trustees as to any question connected to the management of the corporation, any trustee might submit such question for arbitration to the general manager of the Associated Press whose decision was to be conclusive.

These provisions of the Supplemental Agreement,

particularly when considered in connection with the balance thereof and in connection with the main contract (Tr. pages 31 to 56), show, we contend, that it was the intention of the parties that control of the Seattle Times Company and the newspaper being published by it should pass to the trustees *immediately upon the death of Mr. Blethen* and continue until December 30, 1950. That such was the intention is demonstrated conclusively by the proposed will submitted by Mr. Blethen to the Ridders on or about June 28, 1930 (Tr. 11 to 16). It set up the trust as required by the Supplemental contract naming Rae K. Blethen, Elmer E. Todd and Bernard H. Ridder as trustees. These were the persons named in the Supplemental Agreement as the ones to be trustees. The will also named these same persons as executors and provided with respect to both trustees and executors that, in case of any difference or differences of opinion as to any question connected with the management of Seattle Times Company, such difference should be submitted to the manager of the Associated Press, and that his decision would be conclusive. This will clearly indicates an intention on the part of Mr. Blethen that control of the Seattle Times Company and the newspaper being published by it was to pass *immediately upon his death* to those designated as trustees in the Supplemental Agreement. This intention is shown by the following significant facts:

1. Mr. Blethen named identically the same parties as executors who are named as trustees in the contract.
2. He provided that during the period of administration of his estate, the executors should vote

the stock exactly in accordance with the agreement.

3. He provided that the trustees should vote the stock exactly in accordance with the agreement.
4. He provided that disputes both between the executors and between the trustees should be submitted to the general manager of the Associated Press for conclusive decision.

The proposed will was both an expression of Mr. Blethen's intention and his practical construction of the Supplemental Agreement. To restate the matter the words, "after death" as used in the Supplemental Agreement mean effective *immediately upon death* and, if the words "after death" are ambiguous as to meaning, Mr. Blethen by the proposed will gave practical construction to the words and through such construction fixed such a meaning upon them.

In this same connection it is significant to note the language of paragraph nine of the Supplemental Agreement of December 30, 1929 (Tr. 61). This paragraph provides that in the event of Blethen's becoming incompetent, there shall be appointed as his guardians "*the persons hereinabove specified to be the trustees under such last Will and Testament.*" (Italics ours)

The fact that Mr. Blethen in this paragraph referred to "the trustees under such last Will and Testament" clearly indicates that all of the parties intended that these individuals should assume their trust while the will and estate were still in the process of administration.

The Ridders, under the terms of the contract here-

inabove referred to, made a very substantial investment in the Seattle Times, contributing approximately $1,500,000. Both Mr. Blethen and the Ridders were concerned with the question as to the management of the Seattle Times Company and its newspaper upon and following the death of Mr. Blethen. It seems to us that it is apparent that the intention of both was that *immediately* upon Mr. Blethen's death the Ridders, through the designation of one of them as a trustee and through the arbitration provision, should have a voice in the management of the Seattle Times Company and the newspaper in order that the Ridders might be in a position to look after and protect their investment. It is perfectly apparent that, if the Ridders were to be given this protection, they should be put in this position immediately upon the death of Mr. Blethen. We insist that this is what the parties had in mind when they made use of the words "after his death" in paragraph "Eighth" of the Supplemental Agreement. It seems plain that, in making use of the expression "trustees" in the Supplemental Agreement, the parties did not have any technical definition or meaning in mind but rather had in mind persons to take charge of the situation immediately upon the death of Mr. Blethen. It is absurd to reason that this voice and this control were to be postponed until Mr. Blethen's estate should be probated to conclusion. This, everyone knew, would probably take several years. It just does not stand to reason that there was to be an interim of several years before the trustees were to function and the control afforded the Ridder Brothers was to be operative.

The defendants argue that the intention of the parties was that the trustees should take over following the completion of the administration of Mr. Blethen's estate. To say that this was the intention might well result in the defeat of the whole trust program, as outlined in the Supplemental Agreement. It is to be noted that Mr. Blethen's last will is a non-intervention will under the Washington Statutes. This means that the executors may go on for years, and in fact the will itself contemplates that the executors may still be functioning in the year 1951, for by its terms it provides:

> "that my executors shall not, prior to the 30th day of January, 1951, sell, pledge, hypothecate or encumber any of the Class B common stock of Seattle Times Company, without the consent of Ridder Brothers, Incorporated." (Tr. 23, 24)

The trust period expires in 1950, so if we are to say that the Supplemental Agreement is to be construed as providing that the trustees shall not take charge until the estate of Mr. Blethen has been probated to conclusion, then we are advancing a construction which may well result in a total and complete defeat of the trust program as set forth in the Supplemental Agreement. Contracts are not to be given such construction as will result in absurdity. It is absurd to contend that Mr. Blethen and the Ridders had in mind that a construction be placed upon the Supplemental Agreement which might result in a defeat of its purpose. The only reasonable construction which can be placed upon the Supplemental Agreement is the one for which we contend, namely, that the trustees were to have possession and control of the stock in

question immediately upon the death of Mr. Blethen.

As to the meaning of the expression "after death" reference might be made to decisions like *In re Swinburne*, 16 R.I. 208, 14 Atl. 805. In this case a will gave certain shares in the testator's estate to his children and "after their death" to the testator's living heirs. The court said:

> "It seems to us that 'after their death' obviously means immediately after their death, not an indefinite length of time thereafter; the words being introduced to fix definitely the time at which the bequest over is to take effect."

See also *In re Melcher*, 24 R.I. 575, 54 Atl. 379, where it was held that "upon death" and "after death" were synonymous.

Mr. Blethen, by his last will, breached the Agreement between the parties in that he did not make provision for the transfer of the Class B common stock of the Seattle Times Company and the stock of The Blethen Corporation immediately upon his death to the designated trustees. By providing in his last Will as he did he postponed the transfer of these stocks, or the possession and control thereof, to these trustees for the lengthy period it will take to probate his estate. The will involved is not subject to attack. It is entitled to probate as drawn. However, the contract between the parties, referring of course to the Supplemental Agreement of December 30, 1929, can be enforced in a suit in equity. That is what appellant seeks to do in this action.

Partial distribution of the estate is perfectly proper and can be ordered at any time. However, if for any

reason, such partial distribution is thought unwise, undesirable or improper, the agreement of the parties can be carried out and the necessary protection afforded to the Ridders by the simple expedient of granting the second prayer of plaintiff's complaint and decreeing that the executors hold the stock in trust for the trustees, that they vote the same as directed by the trustees and that in case of any difference or differences of opinion between the said trustees as to any question connected with the management of Seattle Times Company, that upon the request of any of the said trustees, they submit said difference or differences to the General Manager of the Associated Press for his decision.

That the right which plaintiff seeks to assert in this so-called first matter in controversy is of substantial value and meets the jurisdictional requirements of the District Court is amply demonstrated by the argument and authorities set forth in appellant's opening brief. It is the right to protect and to some extent control an investment of over a million and a half dollars. It seems idle to even suggest that the value to plaintiff of this right does not exceed the requisite jurisdictional amount.

Respectfully submitted,

JONES & BRONSON,
H. B. JONES
STORY BIRDSEYE
OPPENHEIMER, HODGSON, BROWN, DONNELLY and BAER
WILLIAM H. OPPENHEIMER
MONTREVILLE J. BROWN
Attorneys for Appellant.

Of counsel:
MYLES B. AMEND